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No. 08-1596

IN THE
SUPREME COURT OF THE UNITED STATES

TRACY RHINE,
Petitioner,

v.

CARL DEATON, ET UX.,
Respondents.

On Petition for Writ of Certiorari to the
Court of Appeals of Texas
Second District

BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE TEXAS CIVIL RIGHTS PROJECT IN SUPPORT OF PETITIONER

The Texas Civil Rights Project ("TCRP") is a non-profit public interest law organization that promotes civil rights and racial, economic, and social justice. TCRP, with a membership base of approximately 3,000 Texans, works toward these goals through education, advocacy, and litigation involving civil rights violations. TCRP has five offices around the state — in Austin, the Rio Grande Valley, El Paso, Houston, and Odessa.

TCRP has always had a strong interest in ensuring individuals' civil rights and liberties under the federal constitution are not abridged or modified, whether through legislation, improper enforcement, or judicial action. Protecting the equal protection and due process rights of low-income people has always been a priority for TCRP. Likewise, TCRP has always fought for gender equality and the rights of women and children. TCRP has successfully litigated a number of Title IX cases against school districts providing unequal opportunities to female athletes.

TCRP's Violence Against Women Act (VAWA) program helps immigrant survivors of domestic violence and their children obtain legal status in the United States to escape their abusers. Finally, TCRP was instrumental in having the State of Texas to adopt the interest on lawyers' trust account (IOLTA) program that funds legal aid providers around the state and ensures courts do not "bolt the door to equal justice." *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996). In short, TCRP works to solve "the age-

old problem of providing equal justice for poor and rich, weak and powerful alike." *Id.*

TCRP was founded in 1990, and has tax-exempt status under federal and state laws. It has participated as amicus curiae in other cases before this Court.[1]

SUMMARY OF THE ARGUMENT

Ms. Rhine was denied equal protection and due process in a proceeding terminating her right to involvement in the life of her child, J.C. — a right "far more precious than any property right." *M.L.B.*, 519 U.S. at 119. This proceeding was fundamentally unfair, as both the child and the alleged father were appointed counsel — Ms. Rhine was the only party without a lawyer. When the State and the Texas Department of Child Protective Services ("the Department") allows this fundamental unfairness to occur in a lawsuit involving such a fundamental right, it undermines confidence in the judicial process and discourages victims of domestic violence from seeking assistance from the State.

Finally, child protective services in Texas have a long history of chicanery similar to the "coordinated" effort here to dissolve Ms. Rhine's rights to participate in the life of her child. This shameful State conduct illustrates why this Court's decision in *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18 (1983), must be

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[1] Pursuant to Supreme Court Rule 37(6), amicus curiae states that no counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution to fund the preparation or submission of this brief.

reconsidered, and counsel must be appointed to all parents in parental rights termination proceedings.

ARGUMENT

I. THE TRIAL AND APPELLATE COURT PROCEEDINGS WERE FUNDAMENTALLY UNFAIR TO MS. RHINE

Ms. Rhine was the only party who did not have the benefit of counsel in this litigation. Attorneys were appointed by statute to represent J.C. *and* J.C.'s alleged father, Anthony Farquason, even though Mr. Farguason "received process by substituted service but did not otherwise answer or appear." Petitioner's Appendix D, p.10a; Tex. Family Code § 107.021. J.C.'s attorney *ad litem* was paid $5,566.25, and Mr. Farquason's attorney was paid $1,200.00. Petitioner's Appendix D, at 14a. The costs of both these attorneys' fees were taxed against the foster parents the Department selected to raise J.C. *Id.*

The great irony of this case is had Ms. Rhine done nothing, as Mr. Farquason did, she likely would have been appointed an attorney to protect her rights. Instead, because Ms. Rhine proactively asserted her rights and attempted to represent herself, she was forced by her poverty to proceed without a lawyer. This result alone is fundamentally unfair.

The trial court's willingness to appoint attorneys for J.C. and Mr. Farquason cuts against any interest in not providing an attorney to Ms. Rhine. Decisions about the quantum of due process required are governed by a three-part test: (1) the

private interest affected; (2) the risk of an erroneous deprivation through the procedures used; and (3) the fiscal and administrative burdens the additional procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Texas statutes governing mandatory and discretionary appointments in parental rights termination cases do not require trial courts to consider these factors. *See* Tex. Family Code §§ 107.013, 107.021.

This Court has consistently recognized the State's ability to make a parent "forevermore a stranger to her children" is an awesome power, on par with its ability to incarcerate people. *See M.L.B.*, 519 U.S. at 560; *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[P]ersons faced with forced dissolution of their parental rights have a more critical need for procedural protections"); *Lassiter*, 452 U.S. at 27 ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental rights is ... a commanding one"). In addition to the parent's interest, the minor child "share[s] [this] vital interest in preventing erroneous termination of [the family's] natural relationship." *Id.* Both Ms. Rhine and J.C. had powerful interests in the termination proceeding.

Likewise, the risk of an erroneous deprivation is so high the trial court appointed an attorney to represent the alleged father, even though he never appeared and showed no interest in the proceedings. "[As] accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may be *unwholesomely unequal*." *Lassiter*,

452 U.S. at 28 (emphasis added). A party whose relationship with the child was never even finally established received greater protection than did the child's natural mother.

Finally, the fiscal and administrative burdens appointing Ms. Rhine an attorney would be minimal. The costs of the *ad litem* for J.C. and attorney for Mr. Farquason were paid by the petitioners—not the State. This is a fair allocation of costs. Similarly, appointing counsel for *pro se* litigants frequently eases administrative problems. Ensuring litigants are represented avoids the difficulties courts frequently encounter when dealing with *pro se* parties unfamiliar with judicial procedures.

As this case demonstrates, *Lassiter*'s requirement that trial courts conduct the *Mathews* analysis has proven untenable. (Indeed, Joseph Heller would enjoy requiring an unrepresented person to adequately present her argument that the due process analysis in *Mathews* requires appointment of counsel.) Of course, because Ms. Rhine was unrepresented, the trial court's *Mathews* analysis itself is effectively unreviewable as Ms. Rhine was unable to even secure a transcript for her appeal.

II. LOW-INCOME TEXANS HAVE LITTLE ACCESS TO COUNSEL, AND HAVE A SUBSTANTIAL NEED FOR APPOINTED COUNSEL IN PARENTAL RIGHTS TERMINATION CASES

Texas ranks 43rd in the nation in per capita revenue for the provision of legal aid.[2] In Texas, 813,000 families, 13.5 percent of the State's population, live in poverty.[3] To qualify for free civil legal services, an individual like Ms. Rhine cannot earn more than $13,538 per year.[4] Nationwide, there is only one legal aid lawyer for every 6,861 people living in poverty (compared with one attorney per 525 people in the general population).[5] These limited resources force legal aid providers to turn away between 75-80% of applicants each year.[6] Approximately half the cases handled by legal aid providers are family law cases, many of which involve domestic violence or child custody.[7] These realities mean many Texans effectively have no

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[2] Texas Access to Justice Foundation, *Access to Justice Facts* (2009), *available at* http://www.teajf.org/news/statistics.aspx. The Access to Justice Foundation makes grants from the Texas IOLTA program, and is one of the funders of TCRP's work.

[3] U.S. Census Bureau, Current Population Survey, 2008 Annual Social and Economic Supplement, *available at* http://www.census.gov/hhes/www/macro/032008/pov/new46_100125_07.htm.

[4] 45 C.F.R. § 1611 (2006), Appendix A.

[5] Legal Services Corporation, Documenting the Justice Gap in America, at 17 (June 2007), *available at* http://www.lsc.gov/justicegap.pdf.

[6] *Id.* at 18. Limited resources prevent TCRP from representing closer to 90% of potential clients.

[7] The Perryman Group, The Impact of Legal Aid Services on Economic Activity in Texas, at 10 (February 2009), *available at* http://www.texasatj.org/FINAL%20Econ%20Impact%20Study%2002-12-09.pdf.

access to *pro bono* counsel, even in proceedings as fundamental as the termination of parental rights.

Further, parents involved in child welfare proceedings are also more likely than members of the general public to be victims of domestic violence. A National Institute of Justice study found "domestic violence is a significant problem for 30% to 40% of families in the child welfare system."[8] The same study noted a "practical and inherent conflict [is] likely to arise when two systems – one dedicated to the protection of women exposed to violence, and the other to the protection of children experiencing neglect or abuse – experience the extensive overlap in family caseloads likely to occur with issues so commonly present together."[9] Despite this, domestic violence is rarely considered when child custody determinations are made.[10] There is a likelihood a woman like Ms. Rhine has suffered domestic violence in some form, in addition to being a mother fighting to retain a relationship with her child.

Both parents who are survivors and those who are not may also face criminal child neglect charges related to the basis for parental rights termination.

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[8] Kelly Kelleher, et al., Co-Occurring Intimate Partner Violence and Child Maltreatment: Local Policies/Practices and Relationships to Child Placement, Family Services and Residence, at 5 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/213503.pdf.

[9] *Id.* Of course, no record was developed or made available on appeal to show whether Ms. Rhine was a victim of domestic violence or not as she was not represented by an attorney at trial.

[10] *See* Joan Zorza, Domestic Violence Seldom Considered in Psychologists' Custody Recommendations, 2 Domestic Violence Report, 65 and 68 (1997).

This Court has previously observed "petitions to terminate parental rights are not uncommonly based on alleged criminal activity." *Lassiter*, 452 U.S. at 27 n.3. Survivors of domestic violence may face child abuse charges simply because of the abusive atmosphere their partner creates. "Battered mothers frequently have their parental rights terminated for failure to protect their children from exposure to domestic violence, even when neither the mother nor the batterer has psychically abused the children."[11]

Failing to provide community services to women in abusive relationships undermines the policy goal of keeping families together and getting help for abused children.

> To translate this vision into practice requires shifts in traditional practices. Historically, mothers often have been held responsible for a batterer's violence against them and their children. They may lose their children for failing to protect them from a domestic violence perpetrator. As [one mother] noted when she described the black-and-blue marks that her husband inflicted on her daughter, "*If I take her to the doctor, they'll take her away from me because I'm the mother and I allowed this.*" [Italics added.] Blaming a battered mother for being abused, for not leaving the domestic violence perpetrator, or for not stopping his violence is simply counterproductive. The battered

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[11] Nancy K.D. Lemon, *The Future of Children*, Vol. 9, No. 3, Domestic Violence and Children (Winter, 1999) at 71.

> woman cannot change or stop the perpetrator's violence by herself. If she does not have adequate support, resources, and protection, leaving him may simply make it worse for her children. The battered woman and her children need the community's help.[12]

Given these realities, it is imperative courts be required to appoint counsel to parents facing the termination of their parental rights. Besides the importance of protecting this "commanding" interest, parents who are victims of domestic violence may refuse to cooperate with police and child welfare agencies, if they do not have confidence their rights will be protected and their family kept together. Currently, only 20% of Texans call the authorities when they or a family member experience domestic violence.[13] This Court recognized in *Lassiter* that appointing attorneys in parental rights termination proceedings is "wise public policy." *Id.* at 33. This Court must establish this as more than a "wise public policy," but also a constitutional entitlement.

III. THE TEXAS CHILD WELFARE SYSTEM'S UNFORTUNATE HISTORY MAKES ERRONEOUS DEPRIVATIONS MORE LIKELY

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[12] Susan Schecter, et al., Effective Intervention in Domestic Violence and Child Maltreatment Cases, (1999) at 19.

[13] Texas Council on Family Violence, Abuse in Texas (2002), *available at* http://www.tcfv.org/resources/abuse-in-texas/.

In this case, the Department appears to have deliberately made an end-run around the Texas statute requiring appointment of counsel in Department-initiated termination proceedings. J.C. was born in Dallas County, where the Department took custody of her and initiated parental-rights termination proceedings against Ms. Rhine. Ms. Rhine was entitled by statute to counsel in this action. After the Dallas County court refused to allow the foster parents chosen by the Department to intervene, the Department dismissed the case and the Department-selected foster parents filed a separate termination proceeding in neighboring Tarrant County on the same day. The Fort Worth Court of Appeals, which reviewed the case, described this as a "coordinated maneuver." This disingenuous gamesmanship produced the Department's desired result — placing J.C. with the foster parents—by dancing around Ms. Rhine's statutory rights.

The Department is chronically underfunded and overburdened, resulting in many recent debacles. These embarrassments illustrate the absolute need for parents to be appointed counsel in termination proceedings as a check on arbitrary State action. The risk of erroneous decisions is multiplied when a parent is unable to "ensur[e] that the order which terminated all her parental ties was based upon a fair assessment of the facts and the law." *M.L.B.*, 519 U.S. at 129 (Kennedy, J. concurring) (citing *Mathews*, 424 U.S. at 335).

Highly publicized abuses within the Department made headlines in 2004, around the same time as J.C.'s birth and initial involvement with the Department. An April 2004 report by the Texas Comptroller exposed a number of serious problems and deficiencies in the Texas foster care

system.[14] In 2005, the Texas Legislature's efforts at reform culminated in passage of legislation intending comprehensive change in the Department.[15] The primary Department deficiency targeted was large, unmanageable investigative caseloads.[16] These high caseloads and limited resources not only resulted in poor quality investigations, circumvention of procedures, and excessive investigative caseworker burnout and turnover rates, but also prevented the Department from focusing on outcomes and results rather then just crisis management.[17]

Despite attempts at reform, the Department still lacks adequate funding. Texas ranks 47th nationally in per-child funding for child welfare.[18] According to the Center for Public Policy Priorities, Texas spent an average of just $134 per neglected child, 58 percent less than the national average of $319 per child.[19] The disparities between states' child welfare agencies are striking, and another

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[14] Texas Appleseed, Texas Foster Care: Current Issues, Reform Efforts and Remaining Problems (September 2007), *available at* http://www.texasappleseed.net/1HZ601!.pdf.

[15] Tex. Health & Hum. Serv. Comm'n, et al., Third Senate Bill 6 180-Day Progress Report, at 6 (March 1, 2007).

[16] Dave Mann, *Child's Play: Foster Care's Fiasco*, Texas Observer, March 9, 2007.

[17] Tex. Health & Hum. Serv. Comm'n, et al., First Senate Bill 6 180-Day Progress Report, at 17 (March 1, 2006).

[18] Center for Public Policy Priorities: An Analysis of DFPS's LAR and Senate Bill 758, at 1 (March 5, 2007) *available at* http://www.cppp.org/files/4/POP%20281%20-Nelson%20Bill.pdf.

[19] *Id.*

reason why a uniform right to counsel should be exist in parental termination court proceedings.[20]

The Department's haphazard handling of child protection issues drew national attention when the Department raided the Yearning for Zion Ranch, home of the Fundamentalist Church of Jesus Christ of Latter Day Saints ("FLDS"). Despite attempts at reform, the FLDS fiasco shows the Department remains result-oriented and uninterested in respecting the fundamental rights of parents. On April 3, 2008, the Department took possession, without court order, of 462 children living at the ranch, and the filed suits seeking custody of the children — literally tearing away mothers from their children for months. The Department essentially argued the FLDS belief system abused all the children at the ranch because a very small number of actual child abuse incidents were alleged.[21] Experts and insiders concerned about the ability of the Texas child welfare system to handle properly the case said the system is "underfinanced and understaffed in the best of times, dysfunctional in the worst."[22]

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[20] This Court has noted the costs of appointing counsel in termination proceedings would be relatively low in comparison with appointing counsel in criminal actions. *Lassiter*, 452 U.S. at 28.

[21] *See* Carol Guensburg, *Sorting through the Texas Polygamist Custody Case*, NPR, May 8, 2008. It was ultimately revealed the raid was sparked by a phone call from a disgruntled former member of the church who had made similar calls to authorities in Colorado and Arizona. The Colorado and Arizona authorities found the caller was not credible, and declined to pursue any investigation of the FLDS complexes in their states.

[22] Kirk Johnson & Dan Frosch, *Sect Children Face Another World, but Still No TV*, N.Y. Times, April 26, 2008.

The trial court complied with the Department's plan to remove these 462 children from their families. Dozens of attorneys from around the state appeared *pro bono* to assist the parents and children.[23] (In Texas, parents do not have a statutory right to appointed counsel in a suit that does not involve termination of parental rights.)

On May 29, 2008, the Supreme Court of Texas held the removal of the children was not warranted, and declined to disturb the court of appeals' decision granting writ of mandamus to thirty-eight mothers seeking return of their 126 children. *In re Texas Department of Family and Protective Services*, 255 S.W.3d 613, 615 (Tex. 2008).

But for the mothers' *pro bono* counsel challenging the district court's order separating them from their children, and naming the Department the temporary sole managing conservator of their children, the children's best interests and the mothers' fundamental rights, at best, would have languished in the court system. The FLDS mothers only had counsel because of the high-profile nature of the case. Thousands of women like Ms. Rhine whose cases do not make the front page have to fight for their children without an attorney every day.

Finally, indigent parents are more likely to have their children removed from their home, and African-American parents are more likely to have their children removed permanently. Texas' Health and Human Services Commission and the Department noted in a report in 2006 that poverty was a strong predictor of whether a child would be

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[23] Hilary Hylton, *The Future of the Polygamist Kids*, Time Magazine, April 13, 2008. More than 350 lawyers offered their pro bono services to represent the children.

removed from the home, with more than 60 percent of child removals occurring in families with annual incomes of $10,000 or less.[24]

Further, Department data shows, relative to other racial or ethnic groups, a higher percentage of African American children are removed from their homes, a lower percentage are successfully reunited with their families, and a higher percentage age out of foster care without an adoptive family or other permanent placement.[25]

IV. CONCLUSION: *LASSITER* MUST BE RECONSIDERED AND COUNSEL MUST BE APPOINTED IN ALL PARENTAL RIGHTS TERMINATION CASES

Ms. Rhine's poverty and the Department's devious "coordinated maneuver" ensured she would not have an attorney when facing "the civil death penalty." *M.E. v. Shelby Co. Dep't of Human Res.*, 972 So.2d 89, 102 (Ala. App. 2007) (citing *Tammila G. v. Nevada*, 148 P.3d 759 (2006); *In re K.A.W.*, 133 S.W.3d 1 (Mo. 2004); *Stann v. Levine*, 636 S.E.2d 214 (N.C. App. 2006)). A person without an attorney cannot ensure the *Mathews v. Eldridge* analysis is properly applied to require an attorney be appointed

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[24] Tex. Health & Hum. Serv. Comm'n, et al., Fourth Senate Bill 6 180-Day Progress Report, at 54, (September 1, 2007).

[25] Tex. Dept. of Fam. & Protective Serv., Renewal Initiatives: The Disproportionate Representation of Ethnic or Racial Groups in the CPS System (Disproportionality), *available at* http://www.dfps.state.tx.us/About/Renewal/CPS/disproportionality.asp.

when facing this "unique kind of deprivation." *Lassiter*, 452 U.S. at 27. In Texas, the Department's unfortunate history illustrates parents need appointed counsel to prevent the Department from orchestrating desired, erroneous outcomes. Thus, rather than leaving this critical analysis to the discretion of the trial courts, a bright-line rule requiring appointment of counsel is constitutionally required.

Respectfully submitted,

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